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NO. 90-774

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAN M. LINKOUS
Petitioner,

v.

THOMAS STOVALL, et. al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

JOINT RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FLOYD, TAYLOR & RILEY

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QUESTIONS PRESENTED FOR REVIEW

The five questions which Petitioner alleges are presented should be condensed to two issues:

1) Did the Fifth Circuit err in dismissing Petitioner's appeal for failing to timely file his appeal brief? and

2) In view of the patent lack of merit to Petitioner's underlying claims, should this Court reinstate his appeal?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Come now Donn Fullenweider, Thomas Henderson, and Nancy Linkous, three of the Respondents in the above cause, and

file their Joint Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and as reasons to deny the Writ would respectfully show this Court as follows:

STATEMENT OF THE NATURE AND RESULT OF THE CASE

This is an appeal from an order entered by the Fifth Circuit Court of Appeals dismissing Petitioner's Appeal for Want of Prosecution for failing to timely file his Appeal Brief.

OPINIONS BELOW

The trial court dismissed Petitioner's claims on Motions for Summary Judgment, and issued two opinions finding Petitioner's pleadings violated Rule 11, Federal Rules of Civil Procedure. Those opinions are appendices A and B in Respondents' Appendix to Joint Response to Petition for Writ of Certiorari.

The Fifth Circuit Court of Appeals dismissed Petitioner's Appeal for failing to timely file his Appeal Brief. That Order is Petitioner's Appendix C.

REASONS TO DENY THE WRIT OF CERTIORARI

REASON NO. 1.

The Court of Appeals correctly dismissed the case for want of prosecution after Petitioner failed to file his Brief.

REASON NO. 2.

The Court of Appeals had adequate alternative grounds for dismissal since Petitioner's appeal lacked merit.

REASON NO. 3.

This Court should deny the Writ of Certiorari due to the complete lack of merit to Petitioner's underlying claims.

STATEMENT OF FACTS

Pursuant to Rule 15.1, Rules of the Supreme Court of the United States, Respondents dispute the accuracy and completeness of the statements of both fact and law contained in the Petition for Writ of Certiorari, and respectfully submit the following history of this case:

This appeal is only one of many lawsuits filed by Petitioner against his former wife Nancy Linkous, her lawyer Donn C. Fullenweider, Fullenweider's family, his law firm and law associates arising out of a 1983 divorce action between Petitioner and Nancy Linkous wherein Petitioner received an unfavorable verdict and judgment. Petitioner has filed numerous lawsuits and grievances against Judges, court officials, court reporters, a court-

appointed psychologist, and other lawyers who have taken action of which Petitioner disapproves. Two separate times the United States District Court in this case found that Petitioner's pleadings violated Rule 11 of the Federal Rules of Civil Procedure. (Apps. A and B).

On June 28, 1985 Petitioner filed his original complaint. Petitioner sued the Honorable Thomas J. Stovall, Jr. (presiding judge of the Second Administrative Judicial District of Texas), the Honorable Arthur C. Lesher (Texas State District Judge), the Honorable Dean Huckabee (Judge of the 247th Judicial District Court of Harris County, Texas), Muriel Fiake (a Court appointed psychologist in Petitioner's divorce case), Donn Fullenweider (the attorney for Petitioner's former wife), Donald P. Fogo (the guardian ad litem), and Nancy

Linkous (Petitioner's former wife). The suit requested in part an injunction to prevent Petitioner's divorce case in the Family District Court of Harris County, Texas, from proceeding to trial. (App. C.)

All of the Respondents filed Motions to Dismiss. The Court deferred ruling on the Motions to Dismiss, granted leave for James M. Murphy to appear as counsel for the Petitioner, and granted leave for Petitioner to file an Amended Complaint setting forth "specific facts" to support his complaints. The Petitioner's Amended Complaint was filed November 12, 1985. (Pet. App. p.53) Respondents filed Second Motions to Dismiss. In response to those motions, Petitioner filed a Motion for Leave to a File Second Amended Complaint. On October 16, 1987, the Trial Court granted all Motions to Dismiss, found

that Petitioner's complaint violated Rule 11, and invited Respondents to file Motions for Sanctions. (App. A).

However, Petitioner was again granted leave to amend his Complaint, this time to allege a Racketeer Influenced and Corrupt Organizations Act cause of action against four of the Defendants. Petitioner filed his Second Amended Complaint on November 10, 1987. (App. D) The trial court then appointed William E. Junell, Jr. to represent Nancy Linkous pursuant to 28 U.S.C. §1915(d). (Pet. App. p. 57)

The Defendants filed Motions for Summary Judgment, which were granted on July 19, 1989. (Pet. App. F.). Petitioner failed to file any evidence in opposition to those motions. On March 22, 1990, the Court granted Motions for Sanctions, finding that Petitioner's

pleadings violated Rule 11 of the Federal Rules of Civil Procedure, and awarding $30,000 in sanctions against Petitioner and his counsel. (App. B). Petitioner appealed, pro se. His attorney, James M. Murphy, also filed an appeal from the sanctions award.

The records for the Fifth Circuit Court of Appeals reflect that a partial record was filed in that Court on April 13, 1990. On that date, a briefing schedule was forwarded to all parties setting forth that Petitioner's Brief was due May 16, 1990 (Pet. App. K). Petitioner was specifically warned that allegations of "failure to have access to the record will not be considered grounds for extending the time." (Pet. App. K.)

Petitioner now contends no record was filed with the Fifth Circuit. However, he waited until May 12, 1990 to file

his "Request for the Clerk of this U.S. D.C. to Transmit Record and to Supplement and More Specifically Clarify the Designation of Record to be Transmitted to the Fifth Circuit Court of Appeals." (Pet. App. p. 60) Then, on May 23, 1990, Petitioner filed a "Motion for Extension of Time to File his Appeal Brief." (Pet. App. M) On June 5, 1990, the Fifth Circuit denied Petitioner's Motion for an Order directing the Clerk of the District Court to transmit the entire file to the Fifth Circuit. (Pet. App. A.)

Petitioner's Motion for Extension of Time to File his Brief was also denied. (Pet. App. A.) Petitioner's Motion for Rehearing on that Extension request was denied by a three judge panel. (Pet. App. B.) Petitioner did not file his Brief. (Pet. App. C.) His appeal was

dismissed for want of prosecution on July 9, 1990. (Pet. App. C.)

ARGUMENT

REASON NO. 1 (RESTATED).

The Court of Appeals correctly dismissed the case for want of prosecution after Petitioner failed to file his Brief.

ARGUMENT UNDER REASON NO. 1.

The Court of Appeals has wide discretion in considering Motions for Extension of Time. Federal Rules of Appellate Procedure Rules 26 and 27; Fifth Circuit Court of Appeals Local Rules 27.1, 27.2, and 27.2.1. Litigants must be aware of briefing deadlines, and be prepared to meet them. United States v. Raimondi, 760 F.2d 40 (2nd Cir. 1985); Gilroy v. Erie Lackawanna Railroad Co., 421 F.2d 1321 (2nd Cir. 1970). A litigant ignores

a briefing deadline at his own peril. Id.

The Fifth Circuit has long warned litigants appeals may be dismissed for failing to meet briefing deadlines. Louisiana World Exposition, Inc. v. Logue, 746 F.2d 1033 (5th Cir. 1984); Marcaida v. Rascoe, 569 F.2d 828 (5th Cir. 1978); Swinburn v. First Federal Savings and Loan of Lubbock, Texas, 487 F.2d 338 (5th Cir. 1973); Tidwell v. Dees, 464 F.2d 1297 (5th Cir. 1972); Olympic Co. v. H.D. Harrison, Inc., 413 F.2d 973 (5th Cir. 1969). That warning has been issued by other circuits as well. Barber v. American Security Bank, 841 F.2d 1159 (D.C. Cir. 1988); Stotler and Co. v. Able, 837 F.2d 1425 (7th Cir. 1988); Community Coalition for Media Change v. F.C.C., 646 F.2d 613 (1980).

In this case, the Court of Appeals issued a notice that a partial record was actually filed on April 13, 1990. Although Petitioner contends no record was actually filed, his appeal was not dismissed for failure to file the record. His appeal was denied for failing to file a brief.

Although Petitioner filed a "request" for the entire record to be filed in the Court of Appeals, he filed that request four days before his brief was due. He never made a showing of any specific item that was needed to prepare his brief, nor did he make any effort to file his brief in the absence of the record. It was obviously possible for him to file a brief similar to the one filed in this Court, excerpting necessary pleadings for reference by the Court of Appeals. Such a brief with excerpts is

specifically authorized by Rules 28(e) and 30 of the Federal Rules of Appellate Procedure.

The Court of Appeals was certainly entitled to consider from the volume and tone of documents Petitioner filed in that Court that the purpose of the Appeal was further harassment of Respondents. Such a finding would be consistent with the trial court's finding that the entire lawsuit was brought in violation of Rule 11. The Fifth Circuit also could have found, again from the volume and tone of the various motions filed by Petitioner, that Petitioner wanted the voluminous record before the Court of Appeals solely to harass that Court and delay proceedings, not as an aid to determine any issues on appeal. In any event, nothing prevented Petitioner from filing a brief. Nor did Petitioner seek a rehearing of

the dismissal of his appeal and file a brief at that time as a show of good faith.

The Court of Appeals was well within its discretion in dismissing the appeal and its decision should not be disturbed.

REASON NO. 2 (RESTATED).

There were adequate alternative grounds for dismissal since Petitioner's appeal lacked merit.

REASON NO. 3 (RESTATED).

This Court should deny the Writ of Certiorari due to the complete lack of merit to Petitioner's underlying claims.

ARGUMENT UNDER REASONS NOS. 2 AND 3.

Even in the event this Court is concerned there might have been some error in the dismissal, which Respondents strongly deny, the only appropriate relief would be the reinstatement of his

appeal to be considered by the Court of Appeals. Even that limited relief should be denied because the underlying claims lack any merit, and reinstatement would only result in further harassment of the Respondents, not in the ultimate granting of any relief to Petitioner.

The Fifth Circuit had the authority on its own motion to dismiss Petitioner's appeal for lack of merit, even prior to the filing of briefs. Fifth Circuit Court of Appeals Local Rule 42.2, styled "Frivolous and Unmeritious Appeals", states as follows:

> "If upon a hearing of any interlocutory motion or as a result of a review under Local Rule 34 it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed."

In this case, the District Court found on two different occasions that

pleadings brought by Petitioner were brought in violation of Rule 11 of the Federal Rules of Civil Procedure. This Court can determine from the face of the petitions themselves, as well as the recitation of his claims in the Petition for Writ of Certiorari, that those rulings by the trial court were entirely correct. Since the underlying case lacked merit, the Fifth Circuit had the discretion to dismiss the appeal even without briefs. Gobney v. Jones, 904 F.2d 272 (5th Cir. 1990); Mullen v. Glati, 843 F.2d 293 (9th Cir. 1988); Hale v. Horney, 786 F.2d 688 ()5th Cir. 1986); Holloway v. Walker, 790 F.2d (1170 (5th Cir. 1986); Eitel v. Holland, 798 F.2d 815 (5th Cir. 1986); Kimball v. The Florida Bar, 632 F.2d (1283 (5th Cir. 1980).

This Court has wide discretion in accepting a Writ. Rule 10, Rules of the

Supreme Court of the United States; Shapairo v. Doe, 90 S.Ct. 641 (1970); Pittsburgh Towing Company v. Mississippi Valley Barge Line Co., 87 S.Ct. 641 (1966). For the reasons stated herein, as well as those stated in the District Court's Memoranda and Orders, the Petition for Writ of Certiorari should be denied.

JOINDER IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents Thomas Henderson and Nancy Linkous join in this Response.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully pray that the

Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Joint Response to Petition for Writ of Certiorari has been forwarded to all parties and/or their counsel by certified mail return receipt requested on this 14th day of January, 1991.

Warren Taylor

Warren Taylor